

**IN THE SUPREME COURT
OF THE STATE OF MISSOURI**

NO. SC 83559

STATE OF MISSOURI, ex rel. FORD MOTOR COMPANY

Relator,

vs.

**THE HONORABLE MAX E. BACON, JUDGE
OF THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI,
ASSOCIATE DIVISION**

Respondent.

RESPONDENT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

This matter comes before the Missouri Supreme Court on a Petition for Writ of Prohibition seeking a ruling that Respondent may take no action but to transfer the underlying cases to a different venue. The issue is whether Respondent properly denied Relator's motion to dismiss or transfer for improper venue in the underlying cases where the causes of action did not accrue in Greene County but where Ford Motor Credit Company conducts one of the usual and customary businesses of Ford Motor Company in that county. Relator's Petition for Writ of Prohibition was denied before the Missouri Court of Appeals, Southern District. This court has issued its preliminary writ of prohibition. This court has jurisdiction in extraordinary writ proceedings pursuant to the Missouri Constitution Article V, § 4.

STATEMENT OF FACTS

In order to provide the Court with a clear picture of the evidence before Respondent when the ruling was made on Relator's motion to dismiss, Respondent supplements Relator's statement of facts with the following:

Upon Plaintiffs' filing suit in each respective action, Ford Motor Company filed a motion to dismiss in each. (Petition for Writ of Prohibition, Exhibit D). Plaintiff Duffey filed an initial Response to Defendant (Relator) Ford's Motion to Dismiss or Transfer and subsequently filed Supplemental Suggestions in Opposition to Defendant's Motion to Dismiss or Transfer. (Petition for Writ of Prohibition, Exhibit E, and Respondent's Suggestions in Opposition to Petition for Writ of Prohibition, Exhibit 4). Plaintiffs in the other underlying actions filed substantially identical suggestions in opposition to Ford's motion. (Petition for Writ of Prohibition, Exhibit E). Between the filing of Plaintiff Duffey's response and his supplemental suggestions, the parties had been given leave to conduct discovery on the limited issue of venue. (See generally, Petition for Writ of Prohibition, Exhibit B, page 3, second October 8, 1997, entry). As part of this discovery, Relator responded to interrogatories, requests for production, and requests for admissions regarding, in particular, the relationship between Ford Motor Company and Ford Motor Credit Company. Relator filed a reply to Plaintiffs' suggestions in opposition. (Petition for Writ of Prohibition, Exhibit F).

The underlying cases were consolidated for purposes of ruling upon the motion to dismiss or transfer. (Petition for Writ of Prohibition, Exhibit B, page 2, October 18, 2000, entry). That motion was argued on December 5, 2000. (*Id.*, page 1, October 26, 2000,

entry). Ford took the position that Ford Motor Credit Company is not an office or agent of Ford Motor Company under the venue statute, §508.040. In support of its position, Ford produced the affidavits of a design analysis engineer who works for Ford's automotive group, Ron Ehlert, and litigation counsel of Ford Motor Credit Company, Ann On-Yee Lee. (Petition for Writ of Prohibition, Exhibit F).

Plaintiffs, in opposition to Ford's motion to dismiss or transfer, relied heavily upon Ford's discovery responses to assert that Ford Motor Credit Company is an office or agent of Ford Motor Company. A portion of the facts cited by Plaintiffs or found in the Ford documents produced and used in the proceedings on the motion to dismiss are included here.

Relator has admitted that Ford Motor Credit Company maintains an office in Springfield, Greene County, Missouri. (App. 7, Exhibit 1, Ford Motor Company's Response to Plaintiff's First Request for Admission Number 20).¹ Relator has admitted that Ford Motor Credit Company is a part of Ford Motor Company's Financial Services Group. (App. 6, Exhibit 1, Ford Motor Company's Response to Plaintiff's First Request for Admission Number 16). Additionally, Ford has admitted that a number of documents are true and accurate prints of materials contained in Ford's website, and Ford has produced documents in response to discovery which are pertinent to determining the

¹ References to the Appendix are to the Appendix attached to Respondent's Suggestions in Opposition to Relator's Petition for Writ of Prohibition.

nature of the relationship between Ford Motor Company and Ford Motor Credit Company. (See App. 1-7, 88-94, 176-182, and 429-435.)

In Ford Motor Company's 1994 annual report on Form 10-K, Part 1, Item 1, Business, the report states "Ford Motor Company (referred to herein as "Ford", the "Company" or the "Registrant")... is the second largest producer of cars and trucks in the world and *ranks among the largest providers of financial services in the United States.*" (App. 270, Exhibit D to Exhibit 4, Plaintiff's Supplemental Suggestions in Opposition to Defendant's Motion to Dismiss or Transfer.) (emphasis added). The report further states that the Company's two principal business segments are automotive and financial services. *Id.* The financial services segment is comprised of direct subsidiaries, including Ford Motor Credit Company ("Ford Credit"). *Id.* Ford Credit is a wholly owned subsidiary of Ford. *Id.*

Ford's 1994 Form 10-K shows that the company's pension expense includes that for the Financial Services Group. (App. 335 – 336). Post-retirement benefit expenses also include those for Financial Services. (App. 337). As of December 31, 1994, "Ford (parent company only)" had credit agreements under which funds were available through June 30, 1999, and those funds could be used by either Ford or Ford Credit *at Ford's option.* (App. 339) (emphasis added). The report confirms that "[the] company operates in two business segments: Automotive and Financial Services. The Automotive segment consists of the design, manufacture, assembly, and sale of vehicles and parts and accessories. The Financial Services segment consists primarily of financing operations,

insurance operations, and ... leasing operations.” (App. 345). The report then details certain “inter-segment transactions” between Automotive and Financial Services. *Id.*

In Ford Motor Company’s 1994 annual report to stockholders, Ford Motor Company describes its profile as:

[T]he world’s largest producer of trucks, and the second largest producer of cars and trucks combined. It is also one of the largest providers of financial services in the world... .

The Company’s two core businesses are Ford Automotive Operations and the Financial Services Group – Ford Credit, The Associates, and U.S.L. Capital.

(App. 356, Exhibit E to Exhibit 4).

In recounting 1994 financial results, Ford states “our other core business, Financial Services Group, earned \$1.5 billion in 1994...and included record earnings at Ford Credit...” (App. 359). In a series of questions and answers provided in the annual report, the following appeared:

Q. What role does Financial Services have in the Ford 2000 Global Leadership vision?

A. We share the same vision. Ford wants to be the leading automotive company in the world, and the leading financial services company.

...Ford Credit is our most direct connection with Ford 2000. It just wouldn’t be possible to be the world’s leading automotive company without the world’s leading credit company as a partner. And in Ford Credit, we are already delivering that to Ford.

Q. ...Ford Motor Company's game is the automotive business. Doesn't financial services operate outside that business when you go into home mortgages and personal financing?

A. The best answer to that question is "yes" and "no." The financial services purposely operate outside the automotive core business. No, that does not mean we are operating outside our core competencies... .

Through experience, we learned that diversification works best when it's in an area we know something about, and have expertise in. *That's why financial services was selected as Ford's other core business.* With Ford Credit, we had nearly three decades of experience and success in qualifying, processing and servicing vehicle loans... . Our Ford Credit history also gave us expertise in the worldwide debt markets.

(App. 368-369) (emphasis added).

In the 1995 annual report to stockholders, Ford Motor Company states to its stockholders under the section Growing Shareholder Value that "Ford's Financial Services Group—[including] Ford Credit...complements and supports our automotive business." (App. 399, Exhibit to Exhibit 4). The report further states under Providing Record Growth, Innovative Products, Global Reach that with record net income of \$1.4 billion in 1995, Ford Credit is the world's most profitable captive automotive finance company and a world leader in the number of cars and trucks financed. (App. 405). As Ford's automotive business becomes more global, so is its Financial Services Group. (App. 406).

Ford Motor Company has stated “Ford cannot become known as the world’s leading automotive company without the world’s best automotive finance operations. We have that with Ford Credit.” (App. 30, Exhibit B to Exhibit 1). “*Ford Credit and Associate First Capital Corporation make Ford one of the largest and most profitable providers of financial services in the world.*” *Id.* (emphasis added). According to Ford, the Financial Services Group gives Ford and its customers a competitive advantage because “[i]t supports our automotive business with vehicle financing and by generating cash to keep exciting new products coming....” *Id.* (emphasis added).

In the 1996 annual report to stockholders, Ford states in the section Our Short Term Agenda, “Our efforts are focused in two areas: 1) improve near-term automotive results, and 2) continue to further the earnings and unlock the value of our Financial Services Group.” (App. 13, Exhibit B to Exhibit 1). In the Financial Services Business portion of that section, the report states: “In the ten years since our Financial Services Group was formed, it has contributed nearly \$13 billion in earnings to the company... . Ford Credit, the world’s largest and most profitable provider of automotive finance, now has operations in 33 countries, and also finances vehicles in more than 40 Ford export markets.” (App. 16). In the Down The Road section, the report states “the Ford team had a very busy year in 1996... . We built our 250 millionth vehicle in 1996 and financed our 50 millionth vehicle.” (App. 18). Ford also states in the Customer For Life section of the 1996 annual report that “we want to provide our customers with an ownership experience that is so good they naturally turn to Ford for vehicle purchases, *financing* and service.” (App. 27, Exhibit B to Exhibit 1). (emphasis added).

In the 1997 annual report to stockholders, the operating highlights include sales, revenues, and net income of the Financial Services Group of which Ford Credit is a part. (App. 7e, Exhibit A to Exhibit 1). Ford chairman and chief executive officer Alex Trotman writes in his letter to shareholders that Ford earned \$6.9 billion in 1997, (App. 7g, Exhibit A to Exhibit 1), a number which reflects income from both the automotive and financial services sectors. (App. 7e). He further writes of Ford Credit's moving into new markets in conjunction with or ahead of automotive operations, (App. 7h), which is again mentioned in the Growing Value and Emerging Markets section. (App. 7w). In the Delivering Customer Value portion of the report, Ford writes that "customers who finance their vehicles through Ford Credit are 24 percent more loyal to Ford products than those who finance elsewhere." (App. 7n).

In the Historic Milestones portion of the Ford Motor Company website it is recorded that Ford Motor Credit Company was formed in 1959. (App. 49, Exhibit C to Exhibit 1). In Ford's Historical Library portion of the website it states that, in addition to manufacturing cars and trucks, "Ford is established in a wide range of other businesses - including financial services." (App. 56, Exhibit E to Exhibit 1).

Ford Motor Company advertises special promotions that combine deals on cars and trucks with deals on financing in both print and television media. (See, e.g., App. 82, Exhibit K to Exhibit 1). In this particular promotion the customer is only given one telephone number and e-mail address to contact. There are not separate listings for inquiring about the bonus and financing. *Id.* It is signed by vice presidents of three divisions, one being Ford Credit. *Id.* While the brochure promotes a one hundred twenty

day deferral of payments, the material also indicates that Ford Credit can alter the terms of the financing. *Id.*

Further, Ford's Organization Directory includes members of the Financial Services group, in particular Ford Credit, in the same manner as other divisions and departments of the company. (App. 111, Exhibit 3, Defendant Ford Motor Company's Response to Plaintiff's First Request for Production of Documents; compare App. 136-138, 145-146, or other portions of the directory).

Ford's 1994 Form 10-K illustrates how closely the business of Ford and its wholly owned subsidiary, Ford Credit, are intertwined. Ford Credit financed approximately one-third of all retail sales and leases of new Ford vehicles from 1990 through 1994, and between 71 and 81.5 percent of all wholesale sales of new Ford vehicles during the same period. (App. 277). This includes sales of vehicles from Ford Motor Company to dealers. In addition to vehicle financing, Ford Credit makes loans to affiliates of Ford and finances certain receivables of Ford, among other services. (App. 277). Ford represents that:

Ford Credit relies heavily on its ability to raise a substantial amount of funds ... The level of funds can be affected by certain transactions with Ford such as capital contributions and dividend payments, interest supplements, and other support from Ford for vehicles financed by Ford Credit under Ford sponsored special financing or leasing programs, and the timing of payments for the financing of dealers' wholesale inventories and for income taxes. Ford Credit's ability to obtain funds is affected by its

debt ratings, which are closely related to the financial condition of and the outlook for Ford, and the nature and availability of support facilities, such as revolving credit and receivables sales agreements.

(App. 279, 307).

Additionally, Ford and Ford Credit have a profit maintenance agreement to the extent required to maintain Ford Credit's earnings at specified minimum levels. *Id.* The selected financial data provided by Ford in the Form 10-K includes that from the Financial Services Group. (App. 299, et seq.). Ford Credit's support facilities in 1994 included \$5.9 billion of Ford bank lines that may be used by either Ford or Ford Credit *at Ford's option*. (App. 307). (emphasis added).

On December 7, 2000, Ford's motion to dismiss or transfer for improper venue was overruled. (Petition for Writ of Prohibition, Exhibit G). Ford filed its answer in each case on December 18, 2000. (Petition for Writ of Prohibition, Exhibit C). Approximately two months later, on February 13, 2001, Ford filed its Petition for Writ of Prohibition before the Missouri Court of Appeals, Southern District. (Petition for Writ of Prohibition, Exhibit H). That petition was denied without comment on March 20, 2001. (Petition for Writ of Prohibition, Exhibit K). Ford subsequently filed its Petition for Writ of Prohibition before this Court, and a preliminary writ was granted.

POINT RELIED ON

- I. This Court should not enter an order prohibiting Respondent from taking any action other than to transfer the underlying cases to a different venue because venue is proper in Greene County under §508.040, R.S.Mo., in that Ford Motor Credit Company is an office or agent of Ford Motor Company for the transaction of Ford's usual and customary business of providing financial services, and there is a Ford Motor Credit Company office in Greene County, Missouri.**

State ex rel. Elson v. Koehr, 856 S.W.2d 57 (Mo. banc 1993)

State ex rel. Ford Motor Co. v. Westbrooke, 12 S.W.2d 386 (Mo. App. S.D. 2000)

State ex rel. v. Bunting v. Koehr, 865 S.W.2d 351 (Mo. banc 1993)

State ex rel. State Highway Commission of Missouri v. Curtis, 283 S.W.2d 458
(Mo. banc 1995)

State ex rel. Ford Motor Co. v. Westbrooke, 12 S.W.2d 386 (Mo. App. S.D. 2000)

State ex rel. Dixon v. Darnold, 939 S.W. 2d 66 (Mo. App. 1997)

State ex rel. Elson v. Koehr, 856 S.W.2d 57 (Mo. banc 1993)

State ex rel. Domino's Pizza v. Dowd, 941 S.W. 2d 663 (Mo. App. 1997)

Link v. Kroenke, 909 S.W.2d 740 (Mo. App. 1995)

Hefner v. Dausmann, 996 S.W.2d 660 (Mo. App. S.D. 1999)

Section 508.040, R.S.Mo. (1994)

ARGUMENT

- I. This Court should not enter an order prohibiting Respondent from taking any action other than to transfer the underlying cases to a different venue because venue is proper in Greene County under §508.040, R.S.Mo., in that Ford Motor Credit Company is an office or agent of Ford Motor Company for the transaction of Ford's usual and customary business of providing financial services, and there is a Ford Motor Credit Company office in Greene County, Missouri.**

Section 508.040, R.S.Mo. governs venue in these consolidated cases. The question before this Court is whether the trial court should be prohibited from doing anything other than transferring these cases to different venue. The underlying question is whether, under §508.040, Ford Motor Credit Company is an office or agent of Ford Motor Company for the transaction of its usual and customary business. If yes, then this Court should quash its preliminary writ of prohibition.

If Ford Motor Company had a manufacturing plant in Greene County, Missouri, and plaintiffs had filed suit there, it would be obvious that venue is proper. Relator Ford practically concedes as much with the affidavit of Ron Ehlert.

Because plaintiffs sued in a county not where there is an automotive plant but where there is a Ford Motor Credit Company office, the question is more complex. Ford Motor Company claims to have two primary business segments: the Automotive Group and the Financial Services Group. (App. 270, Exhibit D to Exhibit 4 of Plaintiff's Supplemental Suggestions in Opposition to Defendant's Motion to Dismiss or Transfer;

App. 345, Ford's 1994 Form 10-K; App. 356, Exhibit E to Exhibit 4, Ford's 1994 Annual Report). Were it not for the subsidiaries of Ford, the Financial Services Group would not exist. (See App. 270). However, taken at its terms, Ford's position is that it may only be sued where it makes vehicles, not where it (or its subsidiaries) provides financial services.

Ford's position is inconsistent with the terms of the venue statute. If the venue statute were what Ford wants it to be, the words "or agent" would be taken out of the statute so it would read "... office for the transaction of its usual business," or the language would otherwise have been restricted. See, *State ex rel. Elson v. Koehr*, **856 S.W.2d 57, 61 (Mo. banc 1993)**. In this case, the legislature is deemed to have intended that the words "or agent" have effect. Otherwise, companies could avoid suit in certain venues in which they operate by farming out work to subsidiaries.

From Ford's own documents and admissions, it is clear that Ford Motor Credit Company is an agent for the purpose of conducting Ford Motor Company's usual and customary business. Consequently, the ruling below denying Ford's motion to dismiss or transfer was proper. The preliminary writ should be quashed.

Standard of Review

The burden rests upon Relator to establish Respondent exceeded the court's jurisdiction in overruling Relator's Motion to Dismiss or Transfer. *State ex rel. State Highway Commission of Missouri v. Curtis*, **283 S.W.2d 458 (Mo. banc 1955)**. That burden "includes overcoming the presumption of right action in favor of the trial court's ruling." *State ex rel. Ford Motor Co. v. Westbrooke*, **12 S.W.2d 386, 391 (Mo. App.**

2000), citing *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997). More particularly in this matter, Relator must establish that Ford Motor Credit Company's office in Greene County is not an office or agent of Ford Motor Company for purposes of transacting the latter's usual and customary business. This it cannot do.

- 1. In addition to the design, manufacture, and wholesale distribution of cars, Ford Motor Company's usual and customary business includes providing financial services, and it provides such services through Ford Credit and other subsidiaries.**

The record is clear that Ford Motor Company holds itself out to the general public as a leader in the financial services industry. (App. 30, 270, 356, 359, 399). Ford states that its two main business segments are Automotive Operations and Financial Services. (App. 270, 345, 356). It states that the Financial Services Group was formed to have a business which offsets the cyclical nature of the automotive business. The documents produced or authenticated by Ford establish without question that Ford Motor Credit Company is an integral part of this segment of Ford Motor Company's business. For Ford Motor Company to come into court and argue that venue is improper because it only manufactures vehicles and, as part of that business, has no office in Greene County is at best a misstatement.

The multiple representations and documents which are widely disseminated to the public are in direct contradiction to the affidavit of Ron Ehlert, which is incorporated in various places in Relator's Petition for Writ of Prohibition, but set out separately as Exhibit L. Ehlert attests that the main and customary business is the design, manufacture,

final assembly, and wholesale distribution of motor vehicles. The record clearly establishes that Ford Motor Company is providing financial services, as well.

The test under Section 508.040 is not whether there is an office or agent for the “main and customary” business of the corporation, (see Exhibit L, Ehlert affidavit paragraph 3), but rather for the “usual and customary” business. Section 508.040, R.S.Mo. It is the usual and customary business of Ford Motor Company to provide financial services, as is evidenced by its own admissions. By Ford Motor Company’s own admission, Ford Credit operates for the benefit of Ford to support the automotive operations, increase the ability to develop new products, and improve overall profitability. It is not a mere coincidence that Ford Motor Company’s wholly owned subsidiary bears the name Ford Motor Credit Company.

2. Ford Credit is an office or agent of Ford Motor Company for purposes of establishing venue.

The record is replete with statements by Ford and its representatives that financial services is one of Ford’s core businesses. The record is also replete with evidence of the instrumental position that Ford Credit has in this segment of Ford Motor Company’s operations.

Agency has been held to be the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other act. *State ex rel. Ford Motor Co. v. Westbrooke*, 12 S.W.3d at 390, citing *State ex rel. Elson v Koehr*, 856 S.W.2d 57, 60

(Mo. banc 1993). This Court adopted the language of the Restatement Second of Agency to determine the existence of an agency relationship under Section 508.040:

1. An agent holds a power to alter legal relations between the principal and a third party;
2. An agent is a fiduciary with respect to matters within the scope of the agency; and
3. The principal has the right to control the conduct of the agent with respect to matters entrusted the agent.

State ex rel. Bunting v. Koehr, 865 S.W.2d 351, 353 (Mo. banc 1993). A fiduciary has been defined as one who acts primarily for the benefit of the principal. 12 S.W.3d at 390-391, citing *State ex rel. Domino's Pizza v. Dowd*, 941 S.W.2d 663, 666 (Mo. App. 1997).

In *Bunting*, this Court held that a boat dealer was not the agent of a boat manufacturer where the manufacturer sold the product to the dealer and, under the contractual agreement between them, the manufacturer required the dealer to extend warranties to purchasers and notify the manufacturer of new warranty holders, the manufacturer unilaterally imposed the terms of the warranty, the manufacturer forbade the dealer from altering the terms of the warranty, and the warranty was part of the whole bargain between the dealer and manufacturer. Under those circumstances, this Court held that there was no agency as the dealer did not have the power to alter the legal relationship between the manufacturer and customers or between the manufacturer and the dealer.

In *State ex rel. Domino's Pizza v. Dowd*, 941 S.W.2d 663 (Mo. App. 1997), the court held that no agency relationship existed between a franchisee and franchisor. While the franchisor (Domino's) exerted control over the franchisee's operation, the franchisee's ability to issue coupons and other types of discounts did not affect any legal relationship between Domino's and the customer; similarly the franchisee had no fiduciary duty to Domino's as it was in the business for its own profit.

In contrast, this Court in *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 61 (Mo. banc 1993), held that a travel agent was an agent of an airline. Even though the parties were two separate entities, this Court found that the travel agent passed along the price of the tickets to the airline, the airline was bound to provide air travel to customers who bought the airline tickets, and the agreement between the airline and the travel agent was governed by a number of conditions and restrictions. In making the determination of agency, this court noted "Initially, we believe that an agent under Section 508.040 need not participate in or have authority to act in all facets of a corporation's 'usual and customary business'.... It is sufficient, therefore, if the facet of the business in which the agent does have the authority to act is a significant part of usual and customary business." *Id.* at 61.

In all three cases, the court was dealing with an alleged agent which was unrelated to the company for whom it allegedly was an agent: they were outside companies. Here, Ford Motor Credit is a wholly owned subsidiary of Ford Motor Company. It participates in a significant aspect of Ford's usual and customary business. Contrary to Relator's assertions, the relationship between Ford Motor Credit Company and Ford Motor

Company is such that an agency relationship is established. Consequently, venue is proper in Greene County, Missouri, and Respondent did not exceed his jurisdiction in overruling Relator's Motion to Dismiss or Transfer.

a. Ford Credit does have the power to alter relations between Ford Motor Company and Third Parties and between Ford and itself.

Relator's assertion that Ford Credit has no power to alter the legal relationship between Ford Motor Company and third parties is premised upon the assumptions that Ford Motor Company only manufactures vehicles and does not participate in any other type of business, and that Ford Credit only purchases retail contracts and leases from dealers and provides inventory financing for dealers. (See Exhibit L and M to Relator's Petition for Writ of Prohibition). These assertions are simply not true, as evidenced by the record before the Court. Further, the conclusory statements contained in both affidavits should be disregarded. Simply because Ford Motor Company is not involved directly with the operations outlined in Ann On-Yee Lee's affidavit, one cannot come to the conclusion that Ford Motor Credit Company is not an agent of Ford Motor Company for purposes of establishing venue.

In contrast with the boat dealer in *Bunting*, 865 S.W.2d 351, who was required to extend the warranty to purchasers and could do nothing to alter the terms of the warranty, Ford Motor Credit Company has the power to accept or reject applications for financing and may alter the terms of financing based upon an individual's situation. This is particularly pertinent in that there frequently are Ford sponsored incentive programs which include special interest rates or deferred payment options. (See, e.g., App. 82,

Exhibit K to Exhibit 1). In both print and television advertising, such promotions appear with the caveat that Ford Credit can alter the terms of the promotion.

While it may be true that Ford Motor Company is never a party to these agreements or the purchase of these agreements, Ford Credit's daily operations occur under the apparent authority of Ford Motor Company. Apparent authority exists when a principal, either by its acts or representations, leads a third party to believe that authority has been given to an agent. *Link v. Kroenke*, 909 S.W.2d 740, 745 (Mo. App. 1995). Given that Ford has stated it is one of the largest and most profitable providers of financial services worldwide through Ford Credit and its other financial services subsidiaries, there is no question but that Ford Motor Credit Company is operating with apparent, if not actual, authority from Ford Motor Company when it enters into financial transactions.

Additionally, Ford Credit enters into transactions with the Automotive Operations segment of Ford's business. This has included cash infusions, according to Ford. Ford Credit also finances receivables of Ford and its subsidiaries. There is no indication from Ford that, in the course of these transactions, Ford Credit is forced to accept the terms the parent company (Ford) forces upon it.

Given that Ford Credit may alter the legal relationships between Ford and third persons and between Ford and itself, this prong of agency is met.

b. Ford Credit is a fiduciary of Ford Motor Company.

There can be no doubt based upon the record before this Court that Ford Motor Credit Company is a fiduciary of Ford. A fiduciary is one who acts primarily for the benefit of the principal. *State ex rel. Domino's Pizza v. Dowd*, 941 S.W.2d at 666.

Ford records indicate that the Financial Services Group was formed in 1987 as its second core business to counter balance the cyclical nature of the automotive side of the company. The 1994 annual report includes an interview in which it is stated that “with Ford Credit we had nearly three decades of experience and success in ... vehicle loans with great customer satisfaction and high efficiency. Our Ford Credit history also gave us expertise in the worldwide debt markets...” and that is why Financial Services was selected as Ford’s other core business. (App. 368-639, Exhibit E to Exhibit 4). In 1995, the annual report stated that financial services complements and supports the automotive business. (App. 399).

Ford Credit financed approximately one-third of all retail sales and leases of new Ford vehicles from 1990-1994, and between 71 and 81.5 percent of all wholesale sales of new Ford vehicles during the same period. (App. 277). According to Ford, “customers who finance their vehicles through Ford Credit are twenty-four percent more loyal to Ford products than those who finance elsewhere.” (App. 7n).

Ford stated in the 1996 annual report that with combined assets of \$183 billion, Ford Credit and Associates First Capital Corporation make *Ford* one of the largest and most profitable providers of financial services in the world. (App. 30, Exhibit B to Exhibit 1) (emphasis added). Further, the 1996 annual report states that Financial

Services gives Ford and Ford customers a competitive advantage in that it “supports our automotive business with vehicle financing and by generating cash to keep exciting new products coming.” *Id.* Additionally, Ford’s records clearly reflect the symbiotic relationship between Ford Motor Company and Ford Motor Credit Company. In fact, Ford states that the two companies have a profit maintenance agreement which provides for payment by Ford to the extent required to maintain Ford Credit’s earnings at specified minimum levels. (App. 279, 307). Clearly, Ford Motor Credit Company operates for the primary benefit of Ford.

These facts are sufficient to establish a fiduciary relationship between Ford Credit and Ford. It is inapposite that there is not a segregation of funds by Ford Credit to be handed over to Ford. According to Relator itself, the reason Ford Credit and the Financial Services Group were established was to benefit Ford.

c. Ford Motor Company exercises sufficient control over Ford Credit to establish agency.

As mentioned above, the two companies have a profit maintenance agreement. Further, Ford has, or at one time had, a credit line which could be used by either company at Ford’s option. (App. 339). Further, when Ford does have a special promotion, it may provide support to Ford Motor Credit Company with regard to those programs. Ford includes Ford Credit employees in its pension and post retirement plans. (App. 335-336).

The expansion of Ford Credit offices is tied to where Ford plans to expand its marketing efforts. (App. 7h, 7w). The level of funds that Ford Credit has available can be affected by transactions with Ford, such as capital contributions and dividend

payments, interest supplements, and other support from Ford. (App. 279, 307). The ability of Ford Credit to obtain funds is affected by debt ratings, which are closely related to the financial condition of Ford. *Id.* Ford documents also indicate that Ford sets the growth goals for Ford Motor Credit Company in any given year.

Relator's reliance upon *Hefner v. Dausmann*, 996 S.W.2d 660 (Mo. App. S.D. 1999), is misplaced. In that case, that Court did not reach the issue of whether agency existed for purposes of the venue statute. Rather, that Court addressed whether there was pretensive joinder of a defendant based upon defective pleadings. *Id.*

While the control exerted is not the same type as that in *State ex rel. Elson v. Koehr*, there is sufficient control to establish agency. Ford clearly maintains some control over Ford Credit's operations. It supports and affects Ford Credit's profitability. It is involved in determining the future of Ford Motor Credit Company. The record supports the ruling that venue is proper in Greene County, Missouri, as the Ford Credit office in Springfield, Missouri, is an office or agent for the transaction of the usual and customary business of Ford Motor Company.

CONCLUSION

The corporate venue statute states that a corporation may be sued where it maintains an office or agent for the transaction of its usual and customary business. The record in this case establishes that providing financial services is one aspect of Ford Motor Company's usual and customary business. It further establishes that Ford Motor Credit Company is an agent of Ford Motor Company for the transaction of its usual and customary business. Ford admits there is a Ford Motor Credit Company office in Greene

County, Missouri. Greene County is a proper venue for litigation in which Ford Motor Company is a defendant. This Respondent did not err or exceed his jurisdiction in overruling Defendant's motion to dismiss or transfer. This Court's preliminary writ should be quashed.

Respectfully Submitted,

WHITEAKER & WILSON, P.C.

By _____
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CERTIFICATE OF COMPLIANCE

I, Tamara F. de Wild, the undersigned do hereby certify that the Respondent's Reply Brief includes the information required by Rule 55.03; and complies with the limitations contained in Special Rule No. 1(b). The undersigned certifies that the number of words contained in the Respondent's Reply Brief totals 6,135.

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CERTIFICATE OF SERVICE

I, Tamara F. de Wild, the undersigned do hereby certify that an original and two (2) copies of the above and foregoing Respondent's Reply Brief along with a disk which is certified to be virus free, therein was served upon all attorneys of record and upon Respondent by: () faxing, (**X**) mailing, via First Class, U.S. Mail, postage pre-paid, () overnight mailing, and/or () hand delivering a copy to their respective offices, on this 17th day of August, 2001, as prescribed by law to the following person(s):

SHOOK, HARDY & BACON, L.L.P.

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The Honorable Max E. Bacon
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